IP NEWSLETTER

Information and Privacy Commissioner / Ontario

Vol. 4 Issue 2

Spring 1991

Messages from the Assistant Commissioners

Privacy

How to deal with confidential health care information has been on the public agenda in Ontario for over a decade. Medical information is probably the most sensitive type of personal information that is compiled on a routine basis in our society. With the diverse and sophisticated systems of health care delivery available today, a host of different entities collect, store and disseminate medical information. These include: hospitals, clinics, nursing homes, doctors in private practice, various government institutions such as the Ministry of Health, Health Units and the Workers' Compensation Board, pharmacies, various school systems, not to mention private firms.

In surveying this vast field of health care institutions and other entities that collect or make use of such information, it becomes evident that broad legislation controlling the collection, retention, use, disclosure and security of medical information — wherever it may reside — is not only essential, but long overdue. While we are very pleased that the Minister of Health introduced Bill 24, placing controls on the new health number, we anxiously await further developments in this area with regard to the broader confidentiality legislation noted above, which is expected in draft form some time this year.

Since one of the mandates of the Office of the Information and Privacy Commissioner is to comment on the privacy protection implications of proposed legislation and government programs, I was pleased to participate in a workshop held by the National Task Force on Health Information in Ottawa. Established in 1990, the Task Force assists the National Health Information Council in developing a long term plan for the evolution of a national system for health information. The impact of privacy and confidentiality concerns on the use of health information for research and statistical purposes were discussed. The use of technologies such as electronic data linkage or computer matching of different databases of medical and other information, was explored at length.

Computer matching, which involves the electronic data linkage of separate databases to identify similarities or differences in the

(cont'd on next page)

Access

Fundamental to the mandate of the Office of the Information and Privacy Commissioner (IPC) is the resolution of disputes between requesters and institutions regarding the right of access to records in the custody or under the control of these institutions.

When a request for access to general records or personal information has been denied, the requester has a right under the *Act* to appeal the institution's decision to the IPC. When an appeal is received, the Appeals Department first tries to mediate a settlement between the parties. If mediation is not possible, the appeal proceeds to an inquiry where all parties are given an opportunity to make submissions to the Commissioner or Assistant Commissioner before an order is issued.

The IPC is currently examining the format in which orders are prepared to ensure they meet the needs of all parties involved in the appeal process. The goal of the review is to develop one or more order formats that:

- are understandable and easily readable;
- accurately and adequately reflect the decision-maker's view of the application of the *Acts* to the facts of the appeal;
- uphold the parties' rights to administrative fairness by adequately responding to the issues and representations; and
- develop the interpretation of the *Acts*.

In keeping with this goal, a number of institutions and appellants were contacted and asked for feedback regarding previous orders issued by the IPC. As recipients of our orders, their suggestions for improvement will be an important factor in determining the form that orders take in the future.

The timeliness of the order review is especially appropriate considering that the *Municipal Freedom of Information and Protection of Privacy Act* came into effect on January 1, 1991. As of February 28, 1991, 53 municipal appeal files have been opened. This figure represents 38% of all appeal files opened to that point in 1991.

(cont'd on next page)

Privacy *(cont'd)*

information, has clear privacy implications. As computer matching can, among other things, detect persons or organizations that may be intentionally defrauding the government, it is used extensively to identify those suspected of abusing the system. While computer matching may appear on the surface to be logical and defensible, it is imperative that procedural safeguards be put into place prior to approval and implementation. The central issue in this debate is whether there are adequate safeguards associated with the technology to prevent violations of personal privacy.

To properly examine computer matching within the Ontario government, our office recommended to the Standing Committee of the Legislative Assembly that a Task Force be created to examine this issue and its associated privacy concerns. In our brief to the Committee in its three-year review of the provincial *Freedom of Information and Protection of Privacy Act, 1987*, we suggested that such a task force recommend an appropriate mechanism to control and monitor computer matching within the Ontario government.

Ann Cavoukian, Ph.D.

Access *(cont'd)*

Over the past three years, the proportion of provincial appeals resolved by order has fallen steadily, from 40 per cent in 1988 to 32 per cent in 1989 to only 16 per cent in 1990. As institutions become more knowledgable about the *Act*, requests are responded to in accordance with the presumption that the record should be released, unless an exemption applies. Of those decisions that are appealed, many are settled on the basis of an explanation of the *Act* to either or both parties, and a realization from one or the other that either the record should be released or an exemption properly applies. It is hoped that this trend will be repeated under the municipal *Act*, as experience with that *Act* increases.

Tom Wright

FOIP TRACKING SYSTEM UPDATE

As mentioned in the Winter 1991 IPC Newsletter, the FOIP Tracking System was delivered to some 400 municipal and provincial institutions last December. These institutions received a free copy of the Tracking System software, installation instructions and user's manual. The purpose of the FOIP Tracking System is to allow Co-ordinators to monitor requests and produce summary reports from a database of requested information.

The FOIP Tracking System HOTLINE – (416) 326-1989 – has been busy, so it is evident a number of people have been using the system. Some of the more common problems include:

1. A number of people have been copying the software onto their computers rather than following the installation procedure. The installation procedure asks some questions about the computer being used and the institution. The answers are used to set-up the system properly. Just copying the software results in an incomplete system.

2. Some system users have found the information they have recorded for their first few requests appears "strange". The solution is to go to the UTILITIES area of the system and perform a REINDEX. In fact, reindexing seems to cure most problems and is often a good thing to try when a problem is first discovered.

3. First-time system users are sometimes baffled by the Login screen, particularly if no user-ID's have been created. The user-ID field can be skipped by hitting ENTER or RETURN, depending on your keyboard. Then use the Systems Administrator password created during installation.

4. Due to a system problem the Lister Report cannot be used at present. This is being corrected in Version 2 of the software, and is expected to be functional in the near future.

All inquiries should be directed to the HOTLINE. If calling about a problem, please be sure to complete the problem checklist described on page US9 of the User's Manual. This step will cut down on the number and length of the phone calls needed to solve the problem.

Highlights of the IPC Presentation to the Legislative Committee

On the occasion of the three-year review of the provincial *Freedom of Information And Protection of Privacy Act, 1987*, the Office of the Information and Privacy Commissioner (IPC), presented a brief to the Standing Committee on the Legislative Assembly. This included a document entitled "Suggested Changes to the *Freedom of Information and Protection of Privacy Act, 1987*" which describes the proposals from the office of the IPC.

The report sets out three types of changes to the *Act*. The first are "technical changes", which are prompted largely as a result of faulty legislative drafting, and do not affect substantive rights. The second type of suggested changes have been classified as "clarification changes" and could affect substantive rights. They are considered necessary in order to make the *Act* work more effectively. The third part of the report details "policy changes" which affect substantive rights and may result in changes in the way decisions are made. Several "policy change" suggestions that touch on the substantive provisions of the *Act* are highlighted as follows.

Subsection 52(6) of the *Act* gives the head of an institution the authority to require the Commissioner to inspect a record at the ministry or agency. It is the practice in the vast majority of appeals for the institution to forward a copy of the record to the IPC offices. However it is possible, given the *Act's* present wording, that a head could require the Commissioner and IPC staff to view all records relating to every appeal at the institution's premises. This is both impractical and clearly not the intent of the legislation. Therefore, the IPC has suggested that this section be amended to restrict on-site examination of records to exceptional circumstances where it would not be practical to reproduce the record by reason of its length or nature.

The *Act* provides that where an institution does not respond to a request for access within the 30-day time period, the head is deemed to have refused access. However, if the deemed refusal is appealed, no penalty is available for failure to adhere to the statutory time limits, and therefore, the institution has little incentive to comply. To address this deficiency, the IPC suggests that a subsection be added to the *Act* which allows the Commissioner, in a deemed refusal situation, to require the head to waive fees which would otherwise be recoverable.

The *Act*, in setting out the various privacy protection provisions, is largely silent regarding an institution's obligation to ensure the security of personal information. Since institutions must consider security-related matters in order to fully comply with the privacy provisions of the *Act*, the IPC feels this obligation should be explicitly acknowledged and addressed in the legislature.

There are a number of other privacy-related issues that require attention. The IPC has included a suggested change that would require all correspondence to the IPC from minors and those in correctional institutions or psychiatric facilities be kept confidential. The need for confidentiality is vital, and will ensure that these people are more fully able to exercise their rights under the *Act*.

Another significant issue considers the use of mailing lists. Lists of individual's names and addresses are compiled almost routinely by organizations for a variety of purposes, but principally for commercial gain. While Part III of the *Act* recognizes and protects personal privacy by restricting the use and disclosure of information, the protection may not extend far enough to include mailing lists. The IPC suggests that a sub-clause be added to the *Act* which would include mailing lists to the category of information that, when released, is presumed to constitute unjustified invasion of personal privacy.

The last issue to be highlighted concerns the extension of the powers of the Commissioner. It is recognized by the IPC that any extension of formal powers must be carefully considered by the Standing Committee on the Legislative Committee.

The IPC recommends that the Commissioner be authorized to extend the period for filing an appeal beyond the 30-day time limit, in special circumstances. As long as the exercise of discretion is restricted to exceptional cases, the underlying principles of the *Act* are better served by expressly authorizing the Commissioner to extend the time period; concerns about equity and justice should prevail over strict adherence to time limits.

The IPC also suggests that consideration be given to the following two related amendments. First, the *Act*, while stating that the Commissioner can make an order disposing of an appeal, it does not explicitly provide that an action or decision of the Commissioner is final and conclusive. It is clear from a review of the debates when the *Act* was originally passed, that the legislature intended to establish the Commissioner as the ultimate decision-maker for appeals. The IPC proposes that an express provision to this effect, commonly referred to as a "privative clause", be included in the legislation.

Second, the IPC recommends that the Commissioner be given express authority to reconsider a decision or revoke an order, in exceptional circumstances. This would provide the necessary flexibility to correct the outcome of an appeal where an error has been made, and would eliminate the need for judicial review proceedings.

These two suggested amendments are consistent with provisions found in the enabling legislation for tribunals performing comparable functions to that of the Commissioner. The IPC also recommends that the *Act* give the Commissioner explicit authority to investigate and review activities of institutions that may be in breach of the privacy principles of the *Act*. The *Act* imposes a duty on the Commissioner to perform certain functions, which implicitly requires the authority to investigate complaints and review information management practices of institutions. The proposed amendments codify this authority, following precedents found in other jurisdictions which have similar privacy protection legislation, thereby eliminating any need for the IPC to rely on the good will of institutions when undertaking investigations and reviews.

In conclusion, it is proposed that the Commissioner's order-making powers be extended in the area of privacy protection. At present, these powers are restricted to ordering an institution to cease a personal information collection practice, or to destroy collections of personal information. The IPC believes this authority is not sufficient to adequately ensure the proper management of personal information, and that the Commissioner should also be given authority to order an institution to cease a use, disclosure or retention practice that contravenes the *Act*.

Freedom of Information and Privacy Survey – Summary

The Standing Committee on the Legislative Assembly, as part of its three-year review of the *Freedom of Information and Protection of Privacy Act, 1987*, as amended, initiated a survey to examine the functions of the Freedom of Information and Privacy (FOIP) offices and Co-ordinators. The office of the Information and Privacy Commissioner/Ontario administered the survey on behalf of the Committee. Specifically, the Committee wanted to know how well the *Act* had been implemented. Some 129 institutions were surveyed. The results of that survey are summarized below. It should be indicated that this summary is based on a broad interpretation of the results obtained from the survey. The document entitled *Freedom of Information and Privacy Survey of Ontario Government Institutions* provides a more detailed analysis.

Survey findings show that institutions, on the whole, have sought to implement the *Act* reasonably effectively. Of the institutions surveyed, most have FOIP Co-ordinators in place, most provide reading rooms or library facilities for the public, and at least the minimum materials, such as the Directory of Records, to assist the public with requests. In addition, most institutions have the means to respond to French language requests in that language. Some institutions still need to develop their own internal procedural guidelines for applying the provisions of the *Act* to their particular circumstances.

With regard to the Co-ordinators, the evidence is less uniform. Survey findings indicate that:

- generally, there is an adequate level of staffing to deal with requests.
- Co-ordinators are not highly placed within the decision-making processes and structures of the institutions, and on the whole, are fixed at the mid to lower end of the management scale.
- most Co-ordinators are principally focused on the processing of requests and dealing with appeals and less with other aspects of their roles and duties, particularly in the area of privacy protection.

Finally, in assessing the overall implications of the survey results, access measures seem to have been effectively implemented while privacy concerns have received less attention to date. The immediate need to respond to access requests necessitated the concentration of FOIP efforts on this aspect of implementation. Limited time and resources may have contributed to the lack of progress in privacy issues and procedures. This area of concern, therefore, should represent the next major area for development.

For Your Interest

The following is a list of those who gave presentations or submissions (other than IPC), before the Standing Committee on the Legislative Assembly during its open sessions as of February 28.

- Management Board of Cabinet, Freedom of Information and Privacy Branch
- Ken Rubin, Ottawa Researcher
- Ontario Highway Transport Board
- Environmental Assessment Board
- Parents Empowering Parents
- Mohawk College
- David Flaherty, Professor, University of Western Ontario
- Sault Ste. Marie Police Service
- Metropolitan Toronto Police Force
- Ministry of the Solicitor General
- Ontario Provincial Police
- Joint Submission from:
  - Workers' Compensation Appeals Tribunal
  - Pay Equity Hearings Tribunal
  - Ontario Labour Relations Board
  - Ontario Public Service Labour Relations Tribunal
  - Grievance Settlement Board
- Ontario Genealogical Society
- Canadian Manufacturers' Association
- Radio and Television News Directors Association
- Canadian Broadcasting Corporation
- Professors Christopher Armstrong & Susan Houston, York University
- Professor Donald C. Rowat, Carleton University
- Ontario Board of Examiners in Psychology
- Canadian Daily Newspaper Publishers Association

All inquiries should be directed to:
Mr. Douglas Arnott
Clerk of the Standing Committee on the Legislative Assembly
Room 1521,Whitney Block,Queen's Park
Toronto, Ontario M7A 1A2
(416) 325-3506

NEWSLETTER
ISSN 0844-8701
This *Newsletter* is published quarterly by the Office of the Information and Privacy Commissioner. If you have any comments regarding the *Newsletter*, wish to advise of a change of address or be added to the mailing list, contact:
Communications Branch
Information and Privacy Commissioner/Ontario
80 Bloor Street West, Suite 1700
Toronto, Ontario
M5S 2V1
Telephone: (416) 326-3333
Toll Free: 1-800-387-0073
Fax: (416) 965-2983

Cette publication est également disponible en français.